MOTION FILED
MAR 30 1981

Nos. 79-1429 and 79-1583

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL COTTON COUNCIL OF AMERICA, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Labor, moves for leave to file the attached supplemental memorandum for the federal respondent.

These cases involve a challenge to the occupational health standard for exposure to airborne concentrations of cotton dust, issued by the Secretary of Labor on June 19, 1978, pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(b). On March 27, 1981, subsequent to the oral argument in these cases, the Secretary sent to the Federal Register for publication an Advance Notice of Proposed Rulemaking, stating his intention to undertake additional administrative proceedings for the purpose of reassessing the requirements of the cotton dust standard. The attached supplemental memorandum is submitted to inform the Court of that intervening development and to discuss briefly its effect on the pending cases.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

We wish to bring to the Court's attention a recent development that bears on the appropriate disposition of these cases.

1. On June 19, 1978, the Secretary of Labor issued a final mandatory occupational health standard regulating occupational exposure to airborne concentrations of cotton

dust. 29 C.F.R. 1910.1043, 43 Fed. Reg. 27350-27399 (1978).[1] On pre-enforcement review of the cotton dust standard pursuant to 29 U.S.C. 655(f), the United States Court of Appeals for the District of Columbia Circuit upheld all major provisions of the standard with respect to petitioners. This Court thereafter granted certiorari to decide, among other issues, the role of cost-benefit analysis in setting toxic substances standards under the Occupational Safety and Health Act of 1970. After briefing by the parties, the Court heard oral argument on January 21, 1981.

2. On February 17, 1981, President Reagan issued Executive Order No. 12291, directing all federal agencies to assess potential costs and benefits of major regulatory proposals. See 11 Weekly Comp. of Pres. Doc. 124 (Feb. 23, 1981). In light of this directive, the Secretary has determined to undertake a re-examination of the cotton dust standard and has issued an Advance Notice of Proposed Rulemaking, which was filed with the Federal Register for publication on March 27, 1981. (A copy of the notice is attached as an Appendix, *infra*.) With the aid of administrative rulemaking, the Secretary intends to evaluate the feasibility and utility of cost-benefit analysis in the standard setting process, to compare the costs and benefits of the current standard and various alternatives, and to reassess the current standard in light of the findings.

The Secretary believes that, as indicated in Executive Order No. 12291, an analysis of the costs and benefits of federal regulation is of vital concern to the national welfare and should be taken into account by the government in setting its priorities. See 29 U.S.C. 655(g); Gov't Br. 56. Consonant with the policy underlying the Executive Order,

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[1]Amended at 43 Fed. Reg. 28473-28474, 35032-35035, and 56893-56894 (1978).

it is the Secretary's view that an assessment of the practicality of cost-benefit balancing is best achieved in the context of an actual standard such as the one concerning cotton dust and in a manner that permits public comments.[2]

In the Advance Notice of Proposed Rulemaking, the Secretary has stated that in order to provide for the best analysis, he will seek complete cost estimates for compliance with the current standard as well as for other proposed means of providing protection for employees exposed to cotton dust. The Secretary has also requested the most recent data available of the type necessary for traditional economic analysis, *e.g.*, the financial strength of the industry, and its capital needs and structure.

The Secretary believes that the information, data and comments likely to be received through a public proceeding will permit him to make an informed judgment as to the feasibility and utility of cost-benefit analysis in this area and, if feasible, to produce a comprehensive and thorough cost-benefit analysis of the cotton dust standard. This experience, plus the comparative experience under other health and safety laws (see 29 U.S.C. 655(b)(5)) will enable the Secretary to decide under what circumstances it is appropriate to factor such an analysis into the setting of standards for toxic substances. In particular, because the Secretary must base standards on the "best available evidence" (*ibid.*), the usefulness *vel non* of cost-benefit analysis bears on the legality of employing that analysis in the standard-setting process.

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[2]The Secretary produced one such analysis of this standard, at the request of Congress, after the standard was issued. *Cotton Dust: Review of Alternative Technical Standards and Control Technologies* (May 1979). However, this report and its assumptions, methodology and conclusions were not subject to public comment, and the report did not have the benefit of any recent data.

3. In view of the Secretary's determination to undertake comprehensive supplemental rulemaking to reconsider the cotton dust standard and the role of cost-benefit analysis under the Act, the Court may wish to refrain from further consideration of the issues now before it in the pending cases. The Secretary anticipates that, as a result of the rulemaking proceeding, extensive new information will come to light respecting such matters as the economic strength of the textile industry and the ability of that industry to implement the technology required by the standard. As a result, it is possible that some of the requirements of the standard will be modified. For example, recent reports of the improved economic health of the textile industry might provide a basis for an even more protective standard.

While the action the Secretary intends to take does not moot the present controversy, a decision by the Court at this time would, to a substantial degree, be tantamount to an advisory opinion. Cf. *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977). If, following the rulemaking proceeding, the Secretary determines that a new cotton dust standard should be promulgated, the possibility exists that no "person who may be adversely affected by [the] standard" will seek pre-enforcement review under Section 655(f) in the court of appeals or in this Court. Moreover, even if the new standard is challenged, the issues presented (such as economic feasibility) may be capable of resolution only by reference to the supplemental rulemaking record. Accordingly, the Secretary believes that it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development. See *Cotton Warehouse Ass'n* v. *Marshall*, vacated and remanded, No. 79-1789 (Oct. 6, 1980); Rule 13(d), Gen. R. D. C. Cir.

During the pendency of the proposed administrative proceedings, it is the Secretary's intention that the present standard will remain in effect. Cotton dust has long been recognized as a major industrial health hazard, and the Secretary intends to continue to enforce the present standard in order to provide the necessary protection for the employees at risk. During the past year, employers have been obligated to put into place most of the standard's protective measures, with the exception of the requirement that engineering controls be installed. Completion of the latter obligation was deferred for four years. There was general agreement during the rulemaking proceeding on the necessity for such provisions as respirator usage, safer work practices and medical surveillance programs. It is therefore unlikely that a modified standard would fail to include such provisions, regardless of the Secretary's ultimate determination concerning the most appropriate permissible exposure level or the best means of achieving that level of protection.[3]

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[3]There is ample precedent for preserving the status quo in these circumstances. See, *e.g.*, *Western Oil & Gas Ass'n* v. *EPA*, 633 F. 2d 803, 813 (9th Cir. 1980), and the cases there cited. See also *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 421 (1977). Here, of course, the validity of the cotton dust standard has been upheld by the court of appeals and, if the Court were to vacate and remand for the reasons suggested above, there would be no determination that the standard is in any way contrary to the statute. Hence, there are compelling equitable reasons for maintaining the standard in effect while the supplemental administrative proceedings are underway.

Respectfully submitted.

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APPENDIX

[4510-26]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-052B]

Occupational Exposure to Cotton Dust

AGENCY: Occupational Safety and Health Administration (OSHA) Department of Labor

ACTION: Advance Notice of Proposed Rulemaking

SUMMARY: Notice is given that the Occupational Safety and Health Administration will shortly be undertaking, through rulemaking procedures under section 6 of the Occupational Safety and Health Act of 1970, a reevaluation and reconsideration of the occupational health standard regulating employee exposure to cotton dust, 29 CFR 1910.1043. The purpose of this proceeding is to review the economic consequences of the regulation and in particular to evaluate the feasibility and utility of relying on cost-benefit analysis in setting occupational health standards, in the context of a specific regulation. At this time, public participation is invited on the issues raised by such reevaluation and as to whether other matters relating to the hazards and regulation of cotton dust should be addressed.

DATES: Comments, suggestions and information are invited regarding this Advance Notice of Proposed Rulemaking. Comments in response to this Advance Notice should be submitted by May 15, 1981.

ADDRESSES: Comments should be submitted to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-052B, Room S-6212, U.S. Department of Labor, 3rd and Constitution Avenue, N.W. Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: James Foster, Occupational Safety and Health Administration, Room N3637, U.S. Department of Labor, Washington, D.C. 20210, Telephone (202) 523-8151.

SUPPLEMENTARY INFORMATION:

1. *Introduction*

On June 19, 1978, the Occupational Safety and Health Administration (OSHA) issued a final occupational health standard regulating exposure to cotton dust, 29 CFR 1910.1043, at 43 FR 27350. The new standard superseded the previous Walsh-Healey standard which had been adopted by OSHA pursuant to section 6(a) of the Occupational Safety and Health Act. The necessity for a more stringent and comprehensive regulation was based on the substantial body of scientific and medical evidence showing a severe risk of debilitating respiratory disease, particularly among cotton textile workers. The standard provides for a comprehensive regulatory program including a permissible exposure limit for airborne concentrations of cotton dust to be met through engineering controls, supplementary use of respirators, implementation of specified work practices, a medical surveillance program, and a program for employee education and training. OSHA made findings that these elements of the standard were both technologically and economically feasible; the agency also rejected the use of cost-benefit criteria in setting the standard.

The standard was immediately challenged in the courts of appeals by affected employees and various groups of affected employers. On pre-enforcement review, the United

States Court of Appeals for the District of Columbia Circuit upheld the standard as it applied to the textile industry, among others. *AFL-CIO, et al.* v. *Marshall, et al.*, 617 F. 2d 636 (1979). The textile industry successfully petitioned for review in the Supreme Court of the United States, *American Textile Manufacturers Institute, Inc., et al.* v. *Donovan*, Nos. 79-1429 and 79-1583, in which the industry maintains that the standard is invalid because of the failure of the agency to justify it on a cost-benefit basis. The agency, adhering to its policy at the time the standard was issued, argued that such a justification could not be undertaken consistent with the Act and its purposes. This case is currently pending and no decision has been issued. Contemporaneous with this Advance Notice, the Secretary is filing with the Supreme Court a motion for leave to file a Supplemental Memorandum that brings to the attention of the Court the Secretary's decision to reopen the rulemaking record in the cotton dust proceeding.

2. *The Proposed Rulemaking*

While the agency in the past has maintained that it would be inconsistent with the Act for OSHA to engage in cost-benefit analysis for the purpose of setting standards for exposure to toxic substances, the agency has now concluded that it would be appropriate to re-examine its previous position. That the appropriateness of cost-benefit analysis in the application of regulatory policy is of vital concern to the national welfare and the national government is evidenced by the recent establishment of the Presidential Task Force on Regulatory Relief, chaired by the Vice-President, and the recently issued Executive Order No. 12291 which mandates such analysis in certain rulemakings. (46 FR 13193). The policy underlying that Order is that cost-benefit analysis is a useful device in the regulatory decision making process. Other safety and health agencies, although administering different statutes with somewhat different purposes, have found that the cost-benefit

technique or variants thereof are useful in their decision making processes. See *Consumer Products Safety Commission, Proposed Methodology for Commission Consideration of Findings Under Section 9(c) of the Consumer Products Safety Act*, 45 FR 85772 (Dec. 30, 1980); *Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants; Policy and Procedure for Identifying, Assessing, and Regulating Airborne Substances Posing a Risk of Cancer*, 44 FR 58642 (1979). In consonance with the policy of the Executive Order, it is the agency's view that it is appropriate to evaluate the practicality of cost-benefit balancing by investigating the concept in the context of an actual standard such as cotton dust and in a manner which permits public comment. The agency has already produced one such report on this standard, the report requested by Congress in 1979, *Cotton Dust: Review of Alternative Technical Standards and Control Technologies* (May 1979).* That report, its assumptions, its methodology and its conclusions, were not subject to any public comment; nor did the report have the benefit of any recent data. Evaluations of the usefulness and limitations of cost-benefit analysis are more likely to be understood and be more meaningful if they may be illustrated by reference to a particular set of facts such as the cotton dust record.

In order to provide the most complete and comprehensive analysis, the agency feels that it would be appropriate to utilize the most recent data. To this end, the agency intends to invite the submission of information providing the most complete cost estimates associated with compliance with the standard and any other proposed means of providing protection to exposed employees. OSHA expects

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*This report was produced at the direction of Congress after the issuance of the standard. Congress requested that the agency evaluate the standard on a cost-benefit basis, even though the agency had rejected this approach at the time it issued the standard.

that much useful information will be found in the development of the compliance plans required by 29 CFR 1910.1043(e)(3). Information will also be requested which is relevant to the types of economic analysis which OSHA has traditionally engaged in, such as the financial strength of the industry, its capital needs, its structure and so forth so that the interrelationships between this type of economic analysis and cost-benefit techniques may be evaluated. A thorough cost-benefit analysis will also explore all alternatives, including the use of respirators.

In the agency's view, all this information and data, as well as the public input which will be provided in the rulemaking proceedings, will permit the agency to produce a comprehensive and thorough cost-benefit analysis. This experience, plus the comparative experience under other health and safety laws (a comparison mandated by 29 U.S.C. 655(b)(5)), will enable the agency to decide under what circumstances it is appropriate and practical to factor such an analysis into setting toxic substances standards. Public comment will also be solicited on the issue of the extent to which cost-benefit analysis should be utilized in the setting of OSHA health standards. Based on the resolution of this important question, as well as any new information gathered in the process, the standard itself may be subject to adjustment.

In addition, at this stage of the proceeding OSHA will accept and consider suggestions as to the necessity for inquiring into other matters relevant to the enforcement of the standard. For example, this rulemaking would provide the opportunity, if necessary, to explore any problems with the vertical elutriator and Class III electrical hazards in textile mills, which was previously discussed in the Federal Register of October 10, 1980, 45 Fed. Reg. 67339-67340. Any other problems encountered under the monitoring provisions or in applying the concept of partial-shift use of

respirators discussed at 45 Fed. Reg. 85736-85739 (Dec. 30, 1980), may be pertinent topics for this proceeding.

Pending this reconsideration and reevaluation, it is the agency's judgment that the standard should remain in effect and continue to be enforced. Protection for employees at risk must be maintained as cotton dust has long been recognized as a major industrial health hazard. During the past year, employers have been obligated to bring most of the standard's protective measures into place with the exception of the requirement to install engineering controls, the completion of which was deferred for four years. There was general agreement during the rulemaking on the necessity of such provisions as respiratory usage, safer work practices, and a medical surveillance program, although the particulars may not have been resolved to the satisfaction of all affected employers. The long deferral of the next major step, engineering controls, means however that there is more than sufficient time for the agency to review the provisions of the standard as a whole and provide adequate notice if changes to the standard seem warranted. New effective dates may well be necessary in such a case. Consequently, there seems little justification for disrupting the compliance schedules and activities during this period of review. Any comments and suggestions should be sent to the Docket Office, at the address noted above, where they will be available for inspection and copying. Comments should be submitted by May 15, 1981.

3. *Authority*

This advance notice of proposed rulemaking was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Ave., N.W., Washington, D.C. 20210. It is issued pursuant to section 6(b) of the Occupational Safety and Health Act (84 Stat. 1593; 29 U.S.C. 655).

Signed at Washington, D.C. this 27th day of March 1981.

THORNE G. AUCHTER
Assistant Secretary of Labor

SUPREME COURT, U.S.
APR 9 1981

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE RESPONSE AND RESPONSE OF PETITIONERS TO THE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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April 9, 1981

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MOTION FOR LEAVE TO FILE RESPONSE OF PETITIONERS TO THE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, petitioners, by their counsel, hereby move for leave to file the attached Response to the Supplemental

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Memorandum for the Federal Respondent that was submitted to this Court on March 27, 1981.

The Supplemental Memorandum for the Federal Respondent states the Secretary of Labor's intention to institute a supplemental rulemaking proceeding in which the Cotton Dust Standard at issue in the pending cases will be reevaluated and reconsidered. As part of that reassessment, the Secretary plans to examine the role that cost-benefit analysis should play in the development of standards under Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b). The Supplemental Memorandum for the Federal Respondent discusses the Secretary's view of how this new development affects the pending cases. Petitioners hereby seek to present to the Court their view on this question as well.

Accordingly, petitioners respectfully request that their Motion for Leave to File the attached Response to the Supplemental Memorandum for the Federal Respondent be granted.

Respectfully submitted,

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF PETITIONERS TO THE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

These consolidated cases challenge the validity of the Standard for Occupational Exposure to Cotton Dust promulgated by the Secretary of Labor on June 19, 1978. 29 C.F.R. § 1910.1043, 43 Fed. Reg. 27350 (1978).[1] The

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[1] Amended at 43 Fed. Reg. 28473, 35032, and 56893 (1978).

cases were briefed in November and December 1980 and argued on January 21, 1981. Among the questions presented are (1) whether the Occupational Safety and Health Administration ("OSHA") applied any meaningful or effective cost-related limitations in adopting the Cotton Dust Standard, and (2) whether OSHA is required to show a reasonable relationship between the risk reduction benefits and the costs of the Standard.

On March 27, 1981, the Secretary of Labor made public an Advance Notice of Proposed Rulemaking.[2] That document states the Secretary's intention to undertake a rulemaking proceeding to reevaluate and reconsider the Cotton Dust Standard, with particular emphasis being given to the economic consequences of the Standard and the feasibility and utility of engaging in cost-benefit analysis in setting this and other standards limiting exposure to toxic substances.

As part of this undertaking, OSHA plans "to reexamine its previous position" that use of cost-benefit analysis in the setting of standards for toxic substances would be inconsistent with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979). Supplemental Memorandum for the Federal Respondent at 3a. OSHA also "intends to invite the submission of information" relating to the overall economic impact of the Standard on the affected industry and to a cost-benefit assessment of the Standard. *Id.* at 4a-5a. "[O]ther matters relevant to the enforcement of the standard" also may be considered in the proposed rulemaking. *Id.* at 5a-6a. While this reconsideration and reevaluation is underway, the Standard is

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[2] The notice was published in the Federal Register of March 31, 1981, 46 Fed. Reg. 19501, and appears as an Appendix to the Supplemental Memorandum for the Federal Respondent filed with this Court on March 27, 1981.

to "remain in effect and continue to be enforced." *Id.* at 6a.

In light of these developments, the Secretary of Labor suggests that the Court should not decide these cases at the present time. Petitioners are in complete agreement with this suggestion. As noted above, two of the principal issues raised in these cases concern the adequacy of OSHA's economic feasibility analysis and its failure to assess the expected benefits of the Standard in light of its costs. These two issues now have been identified as the most significant points that the agency plans to reevaluate and reconsider in the rulemaking proceeding that it proposes to institute. Consequently, although these cases are not now moot, the fact that the agency plans to reconsider its position on two of the central issues pending before this Court (and perhaps on a variety of other issues as well) indicates that the cases may become moot, making it unnecessary for this Court to decide them. For that reason, petitioners concur in the Secretary's suggestion that the cases not be decided now.

The Secretary goes on to suggest that the Court should "vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development." *Id.* at 4. In petitioners' view, such a course of action would be appropriate if the Secretary had withdrawn the Cotton Dust Standard or explicitly conceded its invalidity. *See EPA v. Brown*, 431 U.S. 99 (1977). The Secretary, however, has not withdrawn the Standard. To the contrary, OSHA has stated its intention to leave the Standard in effect while the proposed rulemaking proceeds.[3]

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[3] Because the Standard remains in effect (and because there is no suggestion that the court of appeals should reconsider its decision in light of an intervening Supreme Court decision), *Cotton Warehouse Ass'n v. Marshall*, 49 U.S.L.W. 3244 (U.S. 1980), is not in point.

In these circumstances, petitioners believe it would be more appropriate for this Court simply to hold these cases in abeyance and to remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings. When those proceedings are concluded, this Court will be in a better position to determine what disposition should be made of the pending cases. It may well be that the final action taken by OSHA in those further proceedings will make it appropriate to vacate the court of appeals' judgment or to dismiss these cases on some other ground. On the other hand, it is conceivable that those proceedings will not result in action that would obviate the need for this Court to decide the cases.

Accordingly, petitioners respectfully suggest that this Court retain jurisdiction over the present cases, hold them in abeyance, and remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings.

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IN THE

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Petitioners,
v.
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Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,
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v.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF UNION RESPONDENTS TO SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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RESPONSE OF UNION RESPONDENTS TO SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

Two months after the argument in these cases, the Secretary of Labor has come to this Court with the

suggestions: that "the Court may wish to refrain from further consideration of the issues now before it in the pending cases" (Supp. Mem. at 4); and, in addition, "that it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development" (*ibid.*). The interim development that is the occasion for those suggestions is the Secretary's announcement that he has issued an "advance notice of a proposed rulemaking" to "evaluate the feasibility and utility of cost-benefit analysis in the standard setting process, to compare the costs and benefits of the current standard and various alternatives, and to reassess the current standard in light of the findings." (*Id.* at 2).

For the reasons that follow, while we do not object to the Secretary's motion for leave to file the memorandum, we submit that the suggestions contained therein should be rejected.

The supplemental memorandum maintains a studied silence as to what questions of law are before the Court and as to the bearing of those questions on the proposed additional rulemaking proceedings. We submit that in this case, as in *Industrial Union Department* v. *American Petroleum Institute*, —— U.S. ——, 44 USLW 5022 (July 2, 1980), a central issue is whether the Congress itself has set a balance between costs and benefits thereby precluding the Secretary from making his own cost benefit evaluation based on the results of a rulemaking proceeding.[1]

---

[1] While we discuss the implications of that issue with respect to the Secretary's suggestions, we do wish to note another point. It is common ground, we suppose, that a final standard on exposure to cotton dust has been issued, that the standard imposes obliga-

That question of law is not one that depends on the view of any particular administration.[2] Rather, the question turns solely on the meaning of the Act and the intent of the Congress that passed that Act. What the Secretary proposes to do on remand can in no way advance the resolution of that inquiry. And to postpone that inquiry, as the Secretary suggests, could well lead to wasted administrative resources and to additional,

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tions on employers in the cotton manufacturing industry and provides benefits to employees in that industry, that the manufacturers have challenged that standard, and that unless they prevail in this Court, or until the Secretary through the procedures mandated by the Administrative Procedures Act modifies or revokes that standard, it continues in effect. And we assume that the Secretary in accord with his obligations has not, in issuing the advance notice of a proposed rulemaking, prejudged any of the issues to be considered in the proposed proceedings. Nor, of course, has the Secretary bound himself to conclude that proceeding at any given time. Thus, the notice simply means that at some point in the future the Secretary may or may not modify the present standard. We therefore submit that the notice is not an interim development that warrants further postponing a judicial decision of the legality of a health standard which was first noticed for proposed rulemaking over six years ago. In this circumstance, of course, a decision by this Court would not be an "advisory opinion" as intimated by the Secretary; unlike *EPA* v. *Brown*, 431 U.S. 99 (referenced by a "Cf." signal at Supp. Mem. 4), the Secretary has neither withdrawn all or part of the challenged regulation nor confessed error on any part of the merits. On the contrary, as we develop in the text, the very institution of the proposed new rulemaking assumes a particular answer to the issue now before the Court in a live case and controversy between the petitioner manufacturers and the respondents Secretary and Unions.

[2] Executive Order 12991 (February 17, 1981), on which the Secretary bases his request for a remand to undertake a cost-benefit analysis, itself recognizes, at § 2, that the executive only has the authority to conduct a cost-benefit analysis "to the extent permitted by law."

lengthy delays[3] without serving the legitimate interests of any party.

The decision of the District of Columbia Circuit now on review focuses the issue we have just defined:

> In the OSH Act . . . Congress itself struck the balance between costs and benefits in the mandate to the agency. Section 6(b)(5) unequivocally mandates OSHA to
>
> > set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.
>
> Thus Congress concluded that the benefits of health protection warranted the expense of an effective standard.

Pet. App. 72, (footnotes omitted); see also Pet. App. 74.[4]

To the same effect, in his brief on the merits in this Court, the Secretary advised that:

> A cost-benefit test is inconsistent with the language and legislative history of Section 6(b)(5)
>
> * * * *
>
> The pattern and structure of the Act as a whole also demonstrate that Congress did not intend health protection in this area to depend on an individualized

---

[3] Proceedings in this case, commencing with OSHA's publication of an Advanced Notice of Proposed Rulemaking (36 Fed. Reg. 44769), have already consumed more than six years.

[4] Implicit in the Secretary's request that the judgment of the court of appeals be vacated is a recognition that that court's interpretation of the Act forecloses the approach on remand the Secretary proposes to take.

> balancing of costs and benefits with respect to every standard.
>
> * * * *
>
> Congress carefully considered and limited the role that cost considerations should play here, a role that does not include the lowering of feasible standards.

Brief for the Federal Respondent at 39, 41, 46, 47. See also Brief for Union Respondents at 23-40.

In sum this case squarely presents the issue reserved in the plurality opinion in *Industrial Union Department* but treated by the four dissenting Justices in that case as follows (48 USLW at 5051, 5052):

> [T]he legislative history of the feasibility requirement [of § 6(b)(5)] demonstrates that Congress' sole concern was that standards be economically and technologically achievable.
>
> * * * *
>
> [To apply a cost-benefit analysis] would render [§ 6(b)(5)] internally inconsistent by reading into the term feasible a requirement irreconcilable with the express language authorizing the Secretary to set standards assuring that "no employee will suffer material impairment . . . ."

Were this Court, in deciding the instant case, to adopt the interpretation of the Act advanced by the court below, by the Secretary and the Union respondents in their respective briefs on the merits, and by the four dissenting justices in *Industrial Union Department*, the inquiry upon which the Secretary proposes to embark would be precluded by the Act. On the other hand, were this Court to adopt in this case an interpretation of the Act that permits the Secretary to conduct such an inquiry, then the rulemaking proceedings proposed by the Secretary would go forward in the light of this Court's resolution of the statutory question; whatever limitations or guidelines this Court might determine apply to a cost-

benefit analysis under the Act would govern those proceedings. Postponement of this Court's decision would therefore result either in a wholly wasted rulemaking proceeding or in a proceeding that takes place in the context of uncertainty and continuing disagreement as to the governing statutory principles.

CONCLUSION

For the foregoing reasons, the suggestions put forth by the Secretary in his Supplemental Memorandum should be rejected.

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SECOND SUPPLEMENTAL MEMORANDUM OF UNION RESPONDENTS

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SECOND SUPPLEMENTAL MEMORANDUM OF UNION RESPONDENTS

Petitioners have not contented themselves with a response to the Secretary's suggestion that "it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development" (Fed. Resp. Supp. Mem. p. 4). Instead the petitioners have taken the occasion to sug-

gest an alternative extraordinary procedure for the handling of this case: that "it would be more appropriate for this Court simply to hold these cases in abeyance and to remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings" (Pet. App. Mem. p. 4).

As we show below, that alternative not only suffers from the same basic defect as its predecessor advanced by the Secretary but also makes no practical sense on its own terms. Because we had not anticipated that petitioners in their response to the Secretary would make a new proposal of their own, we tender the following brief comments on their submission.

1. In response to the Secretary's memorandum we showed that the *statutory* issue now before the Court involves the scope of the Secretary's authority to weigh the costs and benefits of a standard designed to protect employees from occupational exposure to a toxic substance. The propriety of the Secretary's proposed rulemaking may turn on the resolution of that issue. That resolution depends on the proper interpretation of an act of Congress, a matter peculiarly in this Court's province, not on the view of any particular administration. The petitioners forthrightly acknowledge that the statutory issue stands at the threshhold of the proposed rulemaking: "OSHA plans 'to reexamine its previous position' that use of cost-benefit analyzing in the setting of standards for toxic substances would be inconsistent with the Occupational Safety and Health Act of 1970. . . ." Pet. Supp. Mem. at 2. Accordingly, the reasons that we gave for rejecting the Secretary's suggestions apply equally to the alternative suggestion of petitioners.

2. Petitioners' memorandum neatly and succinctly exposes a fatal error in the Secretary's proposal that the judgment of the court below be vacated and the proceeding remanded (Pet. Supp. Mem. at 3):

In petitioners' view, such a course of action would be appropriate if the Secretary had withdrawn the Cotton Dust Standard or explicitly conceded its invalidity. *See EPA* v. *Brown*, 431 U.S. 99 (1977). The Secretary, however, has not withdrawn the Standard. To the contrary, OSHA has stated its intention to leave the Standard in effect while the proposed rulemaking proceeds.[3]

[3] Because the Standard remains in effect (and because there is no suggestion that the court of appeals should reconsider its decision in light of an intervening Supreme Court decision), *Cotton Warehouse Ass'n* v. *Marshall*, 49 U.S.L.W. 3244 (U.S. 1980), is not in point.

Petitioners' alternative suggestion contains procedural deficiencies of similar magnitude, albeit of a different nature. Petitioners would have this Court "hold these cases in abeyance and . . . remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings." Pet. App. Supp. Mem. at 4.[1] When the further rulemaking proceedings are completed, this Court would then, under petitioners' suggestion, "determine what disposition should be made of the pending cases." *Ibid.* In the normal course new rulemaking proceedings would be sub-

[1] Petitioners' request that while the case is being held in this Court the record be returned to the Secretary appears to be prompted by a desire to demonstrate that their suggestion accomplishes something of substance. But sending the record back to the Secretary would be pointless paper shuffling, since the Secretary has all the information in the record at his disposal and can, and perhaps is required to, take notice in his new rulemaking proceedings of any evidence in the prior related proceeding, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 157. Alternatively the petitioners may be motivated by the view that so long as the validity of the present standard is *sub judice* the Secretary has no power to act to modify that standard. While we are not certain on the point, that view may well be correct. If it is, it confirms our suggestion that the Secretary's "advance notice of a proposed rulemaking" is wholly without legal effect and is therefore not a predicate for either the Secretary's or the petitioners' suggestions.

ject in the first instance to review in a court of appeals. Petitioners' suggestion that this Court hold these cases until completion of such proceedings necessarily contemplates either *direct* review of the proposed proceedings in this Court, or review by this Court of the old standard notwithstanding that the new proceedings—which may alter the substance of the standard and will, in any event, alter the content of the record and of the Secretary's findings—have been completed. Neither of these alternatives makes good sense.

The cases should be decided now so that all parties will know as soon as possible whether the inquiry the Secretary proposes to undertake in further rulemaking proceedings is permitted by the statute and, if so, whatever guidelines or limitations apply to such an inquiry.

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